Supreme Court, U. S.
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IN THE

Supreme Court of the United States

SEPTEMBER TERM

No. 78-497

CARL W. RAMSEY,
Petitioner,

v.

UNITED STATES,
Defendant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Carl W. Ramsey, your petitioner, prays that a writ of certiorari issue to review the Order of the Court of Claims, granting Defendant's Motion To Dismiss Petition on the grounds that the cause of action is barred by the Statute of Limitations.

OPINIONS BELOW

Order of Court Number 56-76, dated February 3, 1978, 215 Ct.Cl. ——, and Order Number 56-76, dated April 27, 1978, 215 Ct.Cl. ——. Copies of these Orders are attached hereto, Appendix A.

JURISDICTION

The judgment of the Court of Claims was entered on February, 1978. The plaintiff's motion for rehearing was denied on April 22, 1978.

The jurisdiction of this Court is invoked under 28 U.S.C. 1255 (1).

QUESTIONS PRESENTED

1. Is the Correction Board a *mandatory* board, thus establishing for statute of limitation purposes, the accrual of the cause of action as of the date of such Board action?

2. Does the acceptance, after the prescribed period, of the plaintiff's petition by the Correction Board, constitute a waiver of the Statute of Limitations?

STATUTES INVOLVED

28 U.S.C. 2501 which provides:

> Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

10 U.S.C. 1552 which provides in part:

> (a) Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department, may correct any record of that department when he considered its necessary to correct an error or remove an injustice . . . .
>
> (b) No correction may be made under subsection (a) unless the claimant or his heir or legal representative files a request therefor before October 26, 1961, or within three years after he discovers the error or injustice, whichever is later. However, a board established under subsection (a) *may excuse a failure to file within three years after discovery if it finds it to be in the interest of justice.* (Italics supplied.)

STATEMENT OF CASE

Plaintiff was commissioned an Ensign in the U. S. Navy following graduation from the United States Naval Academy in 1926, and so served until he was retired for physical disability in 1939. He was recalled to active duty during World War II, and served until he was released and removed from Retirement List February 12, 1942, following the acceptance of his resignation for the good of the service.

He subsequently contended that his resignation was a result of duress and illegal, and thus, he is entitled to continuance on active duty or retention on the Disability Retired List.

He applied to the Navy Correction Board on August 21, 1973 asking that his resignation be rescinded and that he be restored to active duty or to the Disability Retired List.

The Board on May 8, 1974, specifically found that it was in the interest of justice to excuse the failure to file the timely application. The Board recommended correction to reflect withdrawal of the resignation and plaintiff's return to the retired list. The Secretary of the Navy returned the case for reconsideration, but the Board affirmed its previous action. The Secretary then reversed the Board on November 29, 1975, and plaintiff's application was denied.

Plaintiff filed a petition in the Court of Claims on February 19, 1976.

The Correction Board was the only board to consider the plaintiff's claim.

REASONS FOR GRANTING THE WRIT

1. The Decision Of The Court Of Claims Is In Direct Conflict With The Federal Circuit Courts

The Court below, in its Order, has held that the Correction Board action is *permissive;* a number of Federal Courts have held that it is mandatory.

The Court of Claims in its Order stated:

> "Plaintiff's later applications for Correction Board relief which ultimately proved unsuccessful did not toll or defer the Statute of Limitations, those applications were *permissive* not *mandatory,* see *Mathias, supra* 183 Ct.Cl. at 147-48. 391 F.2d at 939, *Kirby* v. *United States, supra* 201 Ct.Cl. at 5132" (seventh sentence). (Italics supplied.)

Although the Court did not so state, it appears that this conclusion was based on *Ogden* v. *Zuckert,* 298 Fed 2nd, 312 (1961), D.C.C.A. In *Ogden* the Defendant contended that the petition should be dismissed for failure to exhaust administrative remedies (i.e., reference to Correction Board) but the Court held that the Correction Board was not a *mandatory* action. However, the then Circuit Judge Warren Burger in dissent stated:

> "I think the District Court correctly held that appellant had failed to exhaust administrative remedies available to him. Congress has authorized creation of a special body, made up of civilians, 'to correct an error or remove an injustice.'

> The majority opinion concedes, and I think correctly, that the Board for Correction of Military Records 'would, if requested assume jurisdiction of Major Ogden's problem, and * * * * could make a recommendation which, if approved and acted upon by the Secretary, would afford plaintiff the relief he seeks * * * *.' I have difficulty in seeing why that is not dispositive of the case. Congress need not explicitly forbid resort to the courts absent exhaustion of administrative remedies. *The familiar doctrine, not challenged by the majority, is that if an administrative remedy is available it must be employed before the courts may be called upon to exercise judicial power."* (pg 317) (Italics supplied.)

Since *Ogden,* supra, apparently following the dissent of Judge Burger, a number of Federal Courts have required an exhaustion of administrative remedies. These cases support plaintiff's claim that the Correction Board action is a *mandatory* action. See:

Schmidt v. *Lair,* 328 FS 1009 (1971) EDNC (4th Cir) —Breach of Enlistment

Sohm v. *Fowler,* 365 Fed 2d 915 (1966) (DC Cir)— Promotion

Heidman v. *United States,* 414 FS 47 (1976) ND Ohio (6th Cir)—Promotion

Salcedo v. *Lauer,* 430 Fed 2d 1282 (1970) (9th Cir)— Illegal Enlistment claimed by plaintiff

Horn v. *Schlesinger,* 514 Fed 2d 549 (1975) (8th Cir) —Promotion

Seepe v. *Dept. of Navy,* 518 Fed 2d 760 (1975) (6th Cir)—Breach of Enlishment

In the recent case of *Knehans* v. *Alexander,* 566 Fed 2d 312 (1977) DCCA the Court noted:

> By the same token, appellant's challenge to the ABCMR's proceedings is, at bottom, irreconcilable with a long line of precedent in this circuit and others that, subject to certain exceptions inapplicable here, an aggrieved military officer must first exhaust his administrative remedies before his particular service's Board for Correction of Military Records prior to litigating his claims in a federal court. * * * * Compare *Ogden* v. *Zuckert,* 298 F.2d 312 (D.C. Cir. 1961). This rule must logically rest on the proposition that such a Correction Board, charged with a responsibility to "correct an error or remove an injustice," 10 U.S.C. § 1522(a) (1970), has by implication sufficient authority to provide the relief appellant now seeks: full reinstatement and backpay. . . . Pg. 315

Further in this respect, the Army's Correction Board is, as the District Court properly characterized it, "a vital part of the promotion apparatus established by Congress."

Knehans, supra, was followed by the D.C. District Court case of *Fisher* v. *Stetson,* # 77-1299, July 27, 1978. The plaintiff was transferred to the retired rolls on March 1, 1971. His action in the District Court was filed July 28, 1977, more than six years later. Defendant moved to dismiss on the statute of limitations—Government Memo of Points and Authorities in Support of Motion to Dismiss pg. 23. Here the briefs were addressed in particular to whether the Correction Board was mandatory or permissive; a reference to *Mathies,* supra, by the defendant, and to *Knehans* by plaintiff. The Court without reference to these authorities, dismissed for failure to exhaust administrative remedies. It may be noted that Judge Gasch who sat in *Fisher* was the U. S. Attorney in *Ogden.*

The Court of Claims made reference to *Ogden* in *Mathias,* supra (Fn. 1, pg. 148) and cited other Federal cases.

The doctrine of a mandatory board is somewhat akin to a requirement of a competent Board to establish accrual of cause of action. The general doctrine in both instances is a need for plaintiff to have an adequate presentation of his case before a board, without any opportunity to be heard, as opposed to Secretarial action.

The Court of Claims in the landmark case of *Friedman* v. *United States,* 159 Ct.Cl. 1 (1962), 310 Fed 2d 381, cert. denied 373 U.S. 932 (1962) established, as a basic premise, action by a competent board. In its opinion, the Court went to great length to discuss physical disability cases and clearly established that the Disability Retirement Board is the Competent Board. However, that by no means precluded the Court's acceptance of any provision for, the cause of action accruing on the date of action by a *competent* board. No rationale is given to warrant exclusion of other types of military pay claims. There is no basis to support any distinction. In all instances, what was required was the action by *some board of competence,* to start the *running* of the statute of limitations. The Court, in *Friedman,* merely uses the Disability Retirement Board cases as a vehicle to set forth the principle, without impairing the efficacy of the basic principal of the requirement of a competent board.

Further in *Hamlin* v. *United States,* 183 Ct.Cl. 137, 391 F.2d 941 (1968) the Court of Claims noted:

> In the instant case, the correction Board was the first board to consider plaintiff's claim and the case is governed by *Harper* in which the court dis-

> tinguished the facts from those in *Friedman, supra*, and held that, since *Harper* did not have a Retiring Board, his claim for disability retirement accrued when the Correction Board acted.
>
> We conclude that plaintiff's claim is not barred by the statute of limitations. pg. 143.

It is significant that *Hamlin* is a non-physical disability case; the Court has required action by a competent board. There was no such board hence no application of the statute of limitations.

2. The Correction Board Being Mandatory, The Accrual For Statute Of Limitations Purposes Is The Date Of The Board Action

It is well established by a number of Circuit Courts that the Correction Board is a *mandatory* proceeding, and not permissive, as stated in the Court of Claims Order, in the instant case. As such, the cause of action in the instant case would accrue on the date of action by the Secretary through the Correction Board. His petition being filed within 6 years of that date, the Court is in error in dismissing the petition.

As noted in Argument 1 above, the Correction Board is mandatory rather than permissive. Thus a petitioner is required to exhaust his administrative remedies by securing a decision from the Correction Board before he can proceed with this Court action. Until completion of such action, he has no standing in Court, no Court can or will assume jurisdiction. Rather the cause of action accrues on date of Board action.

The Court in the instant case has ruled that the Correction Board is a permissive remedy; thus, there is no requirement to consider the effect of a Correction

Board action; no further action is required by the plaintiff, and the Statute of Limitations would run from date of release.

With the Correction Board being mandatory, the complexion of the case is drastically changed. Plaintiff must complete the administrative proceedings to have standing in court; he cannot appeal to the courts until that date. The cause of action would accrue from that date and the Statute of Limitations only *then* becomes operative—such was the clear holding in *Knehans* and *Fisher* and *Hamlin* and cases cited on page 5, supra.

3. Arguing Alternately, The Acceptance Of Plaintiff's Application By Correction Board Constitutes A Waiver Of Statute Of Limitations

There is no question that the sovereign in this, as well as in other types of military personnel law, has consented to be sued, and the Court has jurisdiction, subject to the limitation imposed for suit within 6 years of accrual of cause of action.

The sovereign, by legislative action, has permitted application for relief to the Correction Board, provided the petition is filed within prescribed dates. The legislature has gone one step further to permit acceptance of the application beyond that date, under exceptional circumstances, and at the discretion of the Board.

In the instant case the Board has found exceptional circumstances and has taken action.

Plaintiff contends thus there has been a waiver of the Statute of Limitations. This is not a waiver sua sponte, or by independent action of the board, but a waiver *prescribed* by the legislative body with *dele-*

gated authority to make determination. ***It is a waiver by the sovereign, not by the separate action of the Correction Board.*** As such, it must be given full credit, and the cause of action would accrue from date of action by the Correction Board.

Thus by act of Congress, the date is extended provided the Board finds it to be in the "interest of justice."

Applying the above to the instant case:

1. we have provision to extend the accrual date under certain conditions;
2. a provision by Congress authorizing the Board to pass on the interest of justice;
3. a Board determination establishing the "interest of justice".

The sovereign may be sued upon its consent—here the sovereign has consented.

The provision for consideration of "stale claims" was not because of an oversight by Congress. Legislative history discloses considerable discussion in Congress relative to this point; Congress acted knowingly and advisedly.

4. A Resolution Of The Issues In This Case Is Particularly Desirable

There are potentially many military pay claimants who have, or will, apply to the Correction Board for consideration of their case after the prescribed dated based upon the discretionary clause of Section 1552b. Thus the matter is of significant interest to warrant consideration by this Court.

The Supreme Court has in the past acted to resolve a conflict between a decision of a circuit court and a decision of the United States Court of Claims.

United States v. *Olympic Radio & Television,* 349 US 232, 75 SC 733 (1954)

United States v. *Anderson Clayton & Co.,* 350 US 55, 76 SC 25 (1955)

United States v. *Zacks,* 375 U.S. 59, 61; 84 SC 178, 179

Cass v. *United States,* 417 US 72, 94 SC 2167 (1971)

Here, a claim for Readjustment Pay, the Court of Claims allowed recovery in *Schmid* v. *United States,* 193 Ct. Cl. 780, 436 F2d 987, cert denied 404 US 951 (1971), but the 9th Circuit Court in *Cass* v. *United States,* 483 F.2d 220 denied recovery. The Supreme Court affirmed, 94 SCt. 2167.

A resolution of the issues involved in this case by this court is particularly desirable.

CONCLUSION

The requested Writ of Certiorari should be granted in order to resolve the conflict between the decision of the Court of Claims in the instant case and the decision of the various Circuit Court of Appeals cited herein, including *Knehans*.

Respectfully submitted,

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APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF CLAIMS

No. 56-76

CARL W. RAMSEY

v.

THE UNITED STATES

Military pay; limitation of actions; accrual of cause of action for wrongful discharge

---

Thomas H. King, for plaintiff. *Charles M. Munnecke*, attorney of record. *Charles A. Jonas, King, Everhard and Kiefer*, and *Jonas & Jonas*, of counsel.

George M. Beasley, III, with whom was *Assistant Attorney General Barbara Allen Babcock*, for defendant.

Before DAVIS, *Judge*, Presiding, KASHIWA, and KUNZIG, *Judges*.

Order

This military pay case comes before the court on defendant's motion to dismiss and plaintiff's motion for summary judgment. Plaintiff seeks to have this court rescind the resignation which he submitted "for the good of the service and in lieu of court-martial" on February 17, 1942. In place of that resignation, plaintiff prays for judgment restoring him to the retired list and entitling him to retired pay from February 17, 1942. Defendant moves to dismiss the petition on the ground that it was filed in February 1976 and is barred by the six-year statute of limitations applicable here. 28 U.S.C. § 2501 (1970). It is clear that plaintiff's claim accrued upon discharge (*Mathis* v. *United*

States, 183 Ct. Cl. 145, 391 F.2d 938 (1968); *Kirby* v. *United States*, 201 Ct. Cl. 527, 531 (1973), *cert. denied*, 417 U.S. 919 (1974)), and that the instant petition was filed more than six years thereafter. Plaintiff relies upon disability retirement cases holding that that type of claim accrues upon the action of the first competent board (*Friedman* v. *United States*, 159 Ct. Cl. 1, 310 F.2d 381 (1962), *cert. denied*, 373 U.S. 932 (1963); *Harper* v. *United States*, 159 Ct. Cl. 135, 310 F.2d 405 (1962), but *Mathis* and *Kirby* have made it clear that the rule is different for wrongful discharge cases and that in the latter class of case the cause of action accrues all at once upon the serviceman's removal. Plaintiff's later applications for Correction Board relief, which ultimately proved unsuccessful, did not toll or defer the statute of limitations; *those applications were permissive, not mandatory.* See *Mathis, supra*, 183 Ct. Cl. at 147-48, 391 F.2d at 939; *Kirby* v. *United States, supra*, 201 Ct. Cl. at 531-32. Plaintiff's claim, in short, had long been barred by limitations when he first sought relief through the Correction Board in the 1970's. Even if the Secretary, in denying relief and refusing to follow the Correction Board's recommendation, acted wrongfully toward plaintiff, the judicial claim vindicable in this court had previously expired and the Secretary's negative action would not create a "new" claim. See *Eurell* v. *United States*, 215 Ct. Cl. ——, —— (Dec. 14, 1977) (slip op., p. 7, n.5).

It Is Therefore Ordered, upon consideration of the briefs and exhibits, and after oral argument, that plaintiff's motion for summary judgment is denied and that defendant's motion to dismiss is granted. The petition is dismissed.

By the Court
/s/ Oscar H. Davis
Oscar H. Davis
Judge, Presiding

Feb. 3, 1978

IN THE UNITED STATES COURT OF CLAIMS

No. 56-76

Carl W. Ramsey

v.

The United States

Before Davis, *Judge*, Presiding, Kashiwa, and Kunzig, *Judges*.

Order

This case comes before the court on plaintiff's motion, filed March 31, 1978, for reconsideration *en banc* pursuant to Rules 7(d) and 151(b), with reference to the order entered herein on February 3, 1978, dismissing plaintiff's petition. Upon consideration thereof, together with the response in opposition thereto, without oral argument, by the five active Judges of the court as to the suggestion for reconsideration *en banc* under Rule 7(d), which suggestion is denied, and further having been so considered by the panel listed above as to the motion for reconsideration under Rule 151(b),

It Is Ordered that Plaintiff's said motion for reconsideration be and the same is denied.

By the Court
/s/ Oscar H. Davis
Oscar H. Davis
Judge, Presiding